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November 27, 2002

VIA ELECTRONIC FILING

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, N.W.
Washington, D.C. 20554

Re: Application by SBC Communications Inc. For Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of California; WC Docket No. 02-306

Written *Ex Parte* Presentation by Telscape Communications, Inc.

Dear Ms. Dortch:

Pursuant to Section 1.1206(b)(1) of the Commission's Rules, Telscape Communications, Inc. ("Telscape") submits this written *ex parte* presentation in the above-captioned docketed proceeding. The purpose of this presentation is to respond to a number of inaccurate assertions put on the record by Pacific Bell (or "Pacific" or "SBC") in its reply comments in this proceeding, filed on November 4, 2002. Specifically, Telscape addresses statements contained in the Flynn/Henry/Johnson Reply Affidavit Regarding Billing ("Billing Reply Affidavit") and the Shannon Affidavit Regarding Wholesale Policy, Payphone and Paging Issues ("Wholesale Policy Reply Affidavit").

PacBell Has Failed to Provide Telscape With Accurate Wholesale Bills in Violation of Checklist Item 2

In an *ex parte* presentation and in reply comments filed in this proceeding, Telscape detailed endemic problems associated with Pacific Bell's failure to comply with Checklist Item 2, which requires that Pacific Bell provide competitors with accurate and timely wholesale bills in both retail and BOS BDT format, a crucial component of OSS.[1] Pacific Bell responded to the concerns raised by Telscape, and several other carriers by announcing in its Billing Reply Affidavit that: "Many of the disputes referenced by these CLECs have been resolved, and do not reflect on the quality of Pacific's billing systems at the time this Application was filed."[2] Pacific further asserted that CLECs raising billing issues in this proceeding did "not take advantage of the dispute resolution processes provided by the CPUC. Pacific has worked with these CLECs to resolve their billing issues on a business-to-business, operational basis, believing – until these comments were filed – that Mpower, Telscape, and Vycera were generally satisfied with the handling of their claims."[3]

Pacific's suggestion that Telscape has been "generally satisfied" with Pacific's handling of billing issues between the company is nothing short of ludicrous. In fact, Telscape has availed itself of the CPUC dispute resolution process to settle one claim. However, resolution of this one claim took *14 months to resolve* and Telscape ultimately settled for only 90% of the disputed amount, despite providing evidence that Telscape was entitled to 100% of the disputed amount. Moreover, Pacific Bell urged Telscape to withhold additional dispute escalations and to refrain from filing comments related thereto in the California 271 proceeding, and in exchange, Pacific Bell stated that they would work cooperatively with Telscape to address all of Telscape's outstanding issues. However, Pacific instead stalled Telscape for about 9 months, and in the end settled only 4 of Telscape's 12 major billing issues. Furthermore, Pacific continued to refuse to act upon a number of outstanding operational issues.

UNE-P Deaveraged Loop Rate Credit Issue

In its October 18, 2002 *ex parte*, Telscape noted that when it began ordering UNE-P lines, Pacific charged it the statewide average loop rates, rather than the deaveraged rates, contrary to Telscape's interconnection agreement, and that it took many months before the problem was acknowledged and billing credits were issued by Pacific Bell. Pacific Bell responds in its Billing Reply Affidavit that "Telscape's UNE-P billing was established in October 1999," and that once Telscape raised the issue, Pacific issued Telscape the billing credits it was due in May and August 2002.[4]

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1 *Verizon Pennsylvania Order*, ¶ 23 (citations omitted).

2 Billing Reply Affidavit, ¶ 5.

3 *Id.*

4 Billing Reply Affidavit, ¶ 17.

Contrary to Pacific's assertions, Telscape set up its UNE-P billing in October of 2001, well after its UNE-loop platform and well after the UNE-loops were eligible to receive the deaveraged rate. The credits issued by Pacific in August 2002 for the loops that had been disconnected prior to the conversion were due because SBC continued to haggle with Telscape over the amounts due, even in the face of uncontroverted evidence that credits were owed to Telscape.

Manual Service Order Charges

Telscape has provided evidence that Pacific Bell continues to incorrectly bill the semi-mechanized rate for internal migrations from resale to UNE loop and from UNE-P to UNE loop. In its Billing Reply Affidavit, Pacific states that it "repeatedly has advised Telscape why its internal migrations to UNE loop services are not flow-through eligible, and although that information is clearly set out in the CLEC handbook, Telscape nonetheless continues to submit frivolous disputes seeking reimbursement for semi-mechanized charges relating to such conversions."[5] In SBC's own CLEC handbook, resale to UNE-loop orders were eligible for flow-through until April 2002. In April, SBC changed their handbook, making resale to UNE-loop ineligible for flow-though. Upon being questioned by Telscape, SBC reverted back to the original documentation, and now these orders once again flow through.[6] To the extent that, as evidenced by the Billing Reply Affidavit, Pacific has once again changed its policy, Telscape foresees yet another protracted billing dispute with Pacific.

Pacific further states in the Billing Reply Affidavit that it "has not reversed its position on internal migrations, nor has it agreed to adjust Telscapes' charges to the fully mechanized rate."[7] Pacific goes on to state that: "In April 2002, Pacific inadvertently applied a credit for Telscape on one such claim. Pacific subsequently advised Telscape that a mistake had been made in crediting the claim and that no such adjustments would be applied in the future."[8] This assertion is patently false. SBC has not "subsequently advised Telscape that a mistake had been made in crediting the claim" and that no such adjustments would be applied in the future. As a matter of fact, Telscape's current resale to UNE-loop migrations are receiving a flow-through rate.

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5 Billing Reply Affidavit, ¶ 21.

6 SBC Pacific Bell and Nevada Bell CLEC Handbook, Flow Through Matrix LSOR 5-5.01, page 18 states that "Resale to same CLEC UNE-P is eligible for flow through;" Page 32 states that: CLEC Resale to CLEC -Loop with LNP (same CLEC)" is eligible for flow through.

7 Billing Reply Affidavit, n. 6.

8 *Id.*

End User Port-Back Billing

Telscape has provided evidence in this proceeding demonstrating that Pacific has a policy and practice of inappropriately charging CLECs the manual rate for disconnection of the end user from the CLEC when the end user selects Pacific as its local carrier (an "end-user return"). In its Billing Reply Affidavit, Pacific stated that once Telscape raised the issue in the CLEC User Forum, "Pacific determined that if a CLEC were to initiate the disconnect on its own behalf, the order would be flow-through eligible, and Pacific Bell agreed that it would apply the fully mechanized rate to UNE-P end user return disconnects moving forward. This change was effective February 28, 2002."[9] Pacific's response to Telscape's complaint (i.e., Pacific "agreed" to apply the fully mechanized rate") highlights precisely what is wrong with Pacific's approach to dealing with CLECs on a business-to-business level. Telscape submits that Pacific should be required to submit an LSR to the CLEC, and the CLEC should then put through a disconnect order; which is then automatically eligible for the mechanized rate. However, rather than submit an LSR to a CLEC, Pacific states that they will continue to unilaterally enter the disconnect order for the CLEC, but only charge the mechanized rate. Telscape submits that this is not acceptable.

Furthermore, Pacific's Billing Reply Affidavit mischaracterizes both Telscape's *ex parte* comments and Pacific's own representations to the CLECs at the CLEC User Forum as to how Pacific would apply the credits for end user disconnect charges. Pacific's Billing Reply Affidavit states that:

> Contrary to Telscape's comments, Pacific did not agree to 'automatically' credit all CLECs the amount they were aggrieved" for end user disconnect charges. See Telscape Oct. 24 Ex Parte at 8. Rather, Pacific agreed to conduct a billing review for CLECs with past-billed amounts at the semi-mechanized rate for UNE-P end user return disconnects, and to develop and negotiate adjustment offers for those CLECs through the account team. Pacific is now working through that process. An agreed-upon credit has been negotiated with Telscape.[10]

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9 See Billing Reply Affidavit, ¶ 22.

10 Billing Reply Affidavit, n. 7.

Once again, SBC misrepresents Telscape's statement. Telscape did not state in its *ex parte* presentation that Pacific "agreed" to automatically credit all incorrect billed end user disconnect charges. Rather, Telscape stated that SBC "represented" that they were executing an internal audit and would automatically credit aggrieved CLEC's, but when the final release was issued, Pacific Bell put the burden of proof on each CLEC, directly contrary to Pacific's representation to the members of the CLEC User Forum that Pacific would automatically credit all CLECs for the improperly billed amounts.

Billing for Late Charges

Telscape indicated in its comments and *ex parte* presentation that Pacific continues to bill Telscape for frivolous late charges, and Telscape has repeatedly asked SBC to remove the improper late charges. While it is true that Telscape has not initiated a formal billing dispute with Pacific related to the late charges, Telscape has, in fact, informally escalated this issue to SBC's V.P. Finance. Telscape will now also submit an official billing dispute for Pacific's record, in light of the fact that informal dispute resolution has proven fruitless.

Exclusion of Billing Credits from Performance Measures

As Telscape indicated in its reply comments in this proceeding, Pacific has entered into billing settlement agreements with CLECs whereby SBC unilaterally imposes a settlement condition that provides that any billing credits issued to the CLEC will not be subject to the terms of the California performance incentive plan, and will not impact Performance Measures data. In its Billing Reply Affidavit, Pacific readily acknowledges that it does, in fact, enter into such billing settlement agreements, conditions of which are the exclusion of billing credits from reported Performance Measures. However, Pacific argues that these settlement agreements don't necessarily indicate billing inaccuracies "but rather result[s] from the parties' resolution of a dispute over the precise terms and conditions of the parties' interconnection agreement."[11] Further Pacific argues that credits can be excluded from Performance Measures only "by mutual agreement of the parties."[12]

To assert that the settlement agreements result from mere differences of opinion regarding interpretation of interconnection agreements is nothing more than SBC regulatory doublespeak. SBC cannot deny the fact that exclusion of the billing credits from the Performance Measures masks SBC's true poor billing accuracy performance, and accordingly, Telscape urges the Commission to require SBC to disclose the total impact of its settlement agreements on the

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11 Billing Reply Affidavit, n. 10.

12 *Id.*

Performance Measurement data.[13] To the extent that the Commission allows SBC to exclude these settlements from Performance Measure reporting, the Performance Measure data is essentially worthless.

Moreover, most CLECs operating on razor thin margins have no choice but to sign these settlement agreements if they want to resolve their billing disputes with SBC, and are not in a position to insist that the settlements be included in Performance Measures data. The exclusion of the credits from Performance Measures is nothing more than adhesion contract language, and CLECs have no choice but to accept it if they want to get the credits they are owed. In light of the admittedly inaccurate Performance Measures data, skewed by the exclusion of settlements with CLECs, the Commission should not conclude on the basis of Performance Measure data alone that the billing problems described by Telscape and other commenters are not widespread. Instead, the Commission should conduct its own analysis and require SBC to provide all information associated with the impact of the settlements on the Performance Measure data.

SBC Has Failed to Provide Shared Transport for IntraLATA Toll Calls In Violation of Checklist Item 5

In the Wholesale Policy Reply Affidavit Pacific attempts to address Telscape's still unrefuted argument that Pacific has failed to comply with checklist item 5 by refusing to provide shared transport for intraLATA toll calls. In typical SBC fashion, Pacific's advocacy on this issue borders on dilatory.

In the Wholesale Policy Reply affidavit, Pacific argues that the language resulting from the AT&T and MCImetro arbitrations conducted by the CPUC and the resulting interconnection agreements, satisfies its shared transport obligations. Further, Pacific argues that "in rejecting arguments on this [shared transport for intraLATA toll] issue in the state 271 proceedings, the CPUC specifically pointed to the language of both the AT&T and MCIm Agreements in satisfaction of Pacific's UNE requirements."[14] Furthermore, Pacific disingenuously states that the Commission, in its October 9, 2002, NAL (in which it found SBC in violation of the *SBC/Ameritech Merger Order* for failing to provide CLECs the option of using shared transport to route intraLATA toll calls without restriction between their end user customers and customers served by SBC[15]) "endorsed the CPUC arbitration decision that resulted in the relevant language in

13 *See also* Telscape Communications, Inc., *Ex Parte* at 2-3 (Nov. 1, 2002).

14 Wholesale Policy Affidavit, ¶ 14.

15 *See In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture*, File No. EB-01-IH-0030, NAL/Acct. No. 2002320800004, FRN 0004-3501-24, 0004-335-71, 00005-1937-01, Forfeiture Order (rel. Oct. 9, 2002) ("*Forfeiture Order*").

the AT&T agreement."[16] This characterization of the Commission's comments on the AT&T agreement language is a flat-out misrepresentation.

In the NAL, the Commission actually chastised SBC for twisting and misrepresenting the holding in the CPUC's AT&T decision. In the NAL proceeding, SBC argued that the CPUC's AT&T decision stood for the proposition that SBC need not provide shared transport for intraLATA toll calling. Specifically, the Commission cited SBC for its "overreach[ing] in attempting to characterize various statements in [the FCC's] orders as being indicative of a view that shared transport cannot extend to intraLATA toll because the "local" nature of that obligation is necessarily exclusive of intraLATA toll service.[17]

The Commission went on to state that:

> SBC's overreaching in this regard extends to its reliance on a California state commission decision as well. SBC cites to a California state commission order that SBC says adopted the position that "[c]ompletion of end-user calls over [the incumbent LEC's] intraLATA toll network is not part of the shared transport UNE under the FCC's *UNE Remand Order*." SBC Response at 21, citing *Application of AT&T Communications of California, Inc. (U 5002 C) et al., for arbitration of an Interconnection Agreement with Pacific Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Final Arbitrator's Report, A.00-01-022, at 118-19 (Cal. P.U.C., June 13, 2000). ***SBC's characterization of the California PUC's holding in this proceeding is misleading and incorrect.*** Although the arbitrator did adopt the incumbent's position on the substantive issue in question, it was not on the grounds that SBC suggests. In fact, consistent with our conclusion that SBC is required to offer shared transport for routing intraLATA toll calls, the California PUC held that AT&T was entitled to use shared transport to route its

[16] See Wholesale Policy Affidavit at ¶ 14.

[17] NAL at n. 15.

> intraLATA toll traffic over the incumbent LEC's network, as long as it is used in combination with unbundled switching. Specifically, the California PUC concluded that, when a competing carrier purchases unbundled switching from an incumbent LEC, "that function, in combination with shared transport, can be used to route . . . intraLATA toll traffic." Therefore, even this state decision that SBC uses in an effort to blur the clarity of paragraph 56 rejects SBC's position that shared transport excludes intraLATA toll traffic.[18]

Its no coincidence that Pacific's interpretation of its obligations pursuant to the AT&T/MCIm arbitration decisions is radically different in this 271 proceeding than it was in the NAL proceeding, where Pacific argued that the AT&T stood for the proposition that it *need not provide shared transport to carry intraLATA toll calls*. Pacific cannot have it both ways.

In this proceeding, it suits Pacific's purposes to state that the AT&T/MCIm interconnection agreement provisions provide carriers with shared transport for intraLATA toll calls. However, for well over a year before Pacific released its Accessible Letter CLECC02-291 on October 17, 2002, in which Pacific "voluntarily offered an additional alternative to CLECs"[19] to obtain shared transport for intraLATA toll calls" Pacific patently refused to work with Telscape to accomplish routing intraLATA toll traffic using "option C" of the AT&T or MCIm agreements. Indeed, over the past year, Telscape has continuously sought clarification from Pacific regarding precisely how to implement "Option C" in order to obtain shared transport for the routing of intraLATA toll traffic. At every turn, Telscape has either been provided with inaccurate or incomplete information, or had some other technical hurdle placed in its path by SBC. The issue remains unresolved. However, now, at the eleventh hour of this proceeding, and only in the face of a six million dollar NAL, has SBC decided to comply with the law. However, it is still too soon to declare SBC in compliance with checklist item 5, because SBC has yet to actually process even a single order for its new shared transport for intraLATA toll product, even if there is a carrier out there that has signed the interconnection agreement amendment.

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18 *Id.* (emphasis added.)

19 Wholesale Policy Affidavit, ¶ 15. Despite the "voluntary" nature of the shared transport offering for intraLATA toll calls, Pacific's proposed interconnection agreement amendment implementing this offering states that "Parties understand and agree that the FCC's Forfeiture Order, FCC 02-282, released on October 9, 2002, also forms the basis and rationale underlying Pacific's offering of the IntraLATA Transmission Capabilities provided for in the Amendment..." Wholesale Policy Affidavit, Att. B.

Clearly, in light of Pacific's obvious and un-rebutted failure to comply with the requirements of checklist items 2 and 5, the Commission must deny SBC's application for authority to provide in-region interLATA service in California.

Respectfully submitted,

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